SUPREME COURT, U. S.

JUL 10 1957

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 347

MALCOLM ROBERTS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

STANLEY JAY BARTEL, ESQUIRE
1525 Alfred I. duPont Building
Miami, Florida 33131
and
JOE N. UNGER, ESQUIRE
1525 Alfred I. duPont Building
Miami, Florida 33131
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

MALCOLM ROBERTS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

Petitioner, Malcolm Roberts, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District entered in the above case on June 28, 1966.

OPINION BELOW

The opinion of the court below (Appendix A) is reported in 188 So.2d 392.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was filed on June 28, 1966. (Ap-

pendix A) A timely Petition for Rehearing filed on July 13, 1966 (Appendix B) was denied on July 21, 1966. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C.§1257(3).

QUESTION PRESENTED

Whether a defendant may constitutionally be convicted based upon a confession admitted into evidence over objection where unrebutted proof establishes a threat of physical harm by the interrogating officer in order to secure the confession.

STATUTE INVOLVED

The constitutional provision involved is U. S. Const. Amend. XIV,§1. (Appendix D)

STATEMENT

Shortly after his arrest on April 24, 1964, Petitioner gave a statement at police headquarters to the arresting officers and their supervisor implicating himself in the alleged conspiracy and larceny of which he was later convicted. (R.646-654)

The circumstances surrounding the giving of his "confession" were clearly described by Petitioner when the question of its voluntariness was heard upon objection to admission. When Petitioner refused to "discuss" the case with the arresting officer, he was taken from the interrogation area to an isolated room; told to remove his glasses, "And he told me he was going to put me through the wall unless I answered some questions on the case". (Appendix

A) Shortly, after this threat, Petitioner made his confession. Even though the officers concerned testified, Petitioner's testimony as to the threat of physical violence stands absolutely unrebutted in one thousand pages of testimony. Furthermore, while Petitioner may have been advised to secure the services of an attorney, his written statement was taken before his counsel arrived at the police station. (R.579,580,591) Going further to coercion in the taking of Petitioner's statement was his testimony of a promise of leniency in exchange for his confession implicating codefendants. (R.617,623)

Objection to the admissibility of Petitioner's pre-trial statement as unconstitutionally secured was made and sustained when proffered the first time for introduction into evidence. (R.334,355) On a subsequent proffer, the trial judge again sustained the objection to admitting the pre-trial statement of Petitioner. (R.599) When, for the third time, Petitioner's statement was offered into evidence by the State, objection was made on behalf of Petitioner. (R.638)

Lengthy argument of counsel followed, directed to whether Petitioner had been denied his right to counsel in connection with giving the pre-trial statement, as well as whether the statement was freely and voluntarily obtained. Petitioner's rights were asserted under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. (R.639,640,641) Subsequent to argument, the trial judge admitted Petitioner's confession into evidence, over strenuous objection, based on a finding that, under the evidence, Petitioner was not denied the right to counsel in connection with his confession. (R.642-645) *No mention was made by the trial judge of the unrebutted*

evidence of coercion and its affect on the free and voluntary aspect of the confession.

Thereupon, the confession of Petitioner was read in its entirety to the jury. (R.646-654) The jury returned a verdict of guilty as to Counts I and II of the Indictment—Conspiracy to Commit Grand Larceny and Grand Larceny. (R.983) Petitioner was sentenced to imprisonment in the State Penitentiary for fifteen months under Count I, and three years under Count II. (R.994) Motion for New Trial was denied. (R.985,988)

Timely appeal was lodged in the District Court of Appeal of Florida, Third District (R.997), under the provisions of Fla.Const.art.5,§5(3). The question of the invasion of Petitioner's constitutional rights under the Fourteenth Amendment to the United States Constitution by introduction into evidence of a confession not emanating from the free will of an accused was raised on the appellate level by virtue of the following Assignments of Error:

1) The trial court erred in admitting into evidence the pretrial statement of defendant, MALCOLM ROBERTS, made to the investigating officers on April 24, 1964.

2) The trial court erred in entering its adjudication of guilty against the defendant, MALCOLM ROBERTS, which adjudication of guilty was based in part upon the contents of a pretrial statement made by MALCOLM ROBERTS to investigating officers on April 24, 1964. (Appendix E)

It was vigorously argued on appeal that the State failed to sustain its burden to most clearly show that the confession introduced into evidence resulted from an unfettered exercise of will by an accused, uninfluenced by any degree of compulsion, physical or mental. While recognizing that Petitioner's testimony of a threat of physical violence to induce confession was not refuted in the record, the appellate court held such testimony not sufficient to require a determination that Petitioner's confession was involuntary because 1) the alleged threat was not accompanied by physical violence; 2) Petitioner showed every evidence of being an intelligent and well-informed person; 3) confession was made in a room in which there were several persons; and 4) Petitioner did not state he was in fear at the time of threat or confession. (Appendix A) The conviction and sentence for Conspiracy to Commit Grand Larceny was affirmed, *based upon Petitioner's confession*, as well as other evidence, while it was decided that there was not sufficient evidence to convict for Grand Larceny. (Appendix A) Timely Petition for Rehearing was filed (Appendix B) and denied. (Appendix C)

Under the Constitution of the State of Florida, this decision by the District Court of Appeal of Florida, Third District, was that of the highest court in which appeal could be had as a matter of right. Fla.Const.art.5,§4(2). Fla.Const.art.5,§5(3).

Petitioner sought to invoke discretionary review by the Supreme Court of Florida by means of a timely Petition for Writ of Certiorari, supporting brief and record. Fla.Const.art.5,§4(2); Rule 4.5c, Florida Appellate Rules. The Supreme Court of Florida declined to exercise its authority (Appendix F), and timely Petition for Rehearing

was denied by order of that Court dated May 17, 1967. (Appendix G)

REASONS FOR GRANTING THE WRIT

1. The question presented, dealing with whether a confession was involuntarily given, is of the utmost importance to the guarantee of due process of the law in the administration of criminal justice. No further elaboration on the significance of the question here involved is necessary other than reference to the words of this Court in *Davis v. North Carolina*, 384 U.S. 737, 741, 742, 16 L.Ed.2d 895,898, 86 Sup.Ct.1761 (1966):

> "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."

2. The decision below is in conflict with the same decision of this Court requiring retrial of a Petitioner where, "wholly apart from the disputed facts, a statement of the case from facts established in the record . . . leads plainly to the conclusion that the confessions were the product of a will overborne." *Davis v. North Carolina*, 384 U.S. 737,742, 16 L.Ed.2d 895, 898, 86 Sup.Ct. 1761 (1966). While the record here indicates a dispute as to promises of leniency to secure the confession (R.342,617,623), it is unrebutted that Petitioner was removed to an isolated place and threatened with physical violence if an inculpatory statement was not forthcoming. Petitioner's confession which immediately followed these threats was unquestionably the "product of a will overborne."

3. The decision below based in part on a finding that the threat to Petitioner was not accompanied by physical violence, is in conflict with those decisions of this Court recognizing that unconstitutional coercion can be mental as well as physical. *Chambers v. Florida*, 309 U.S. 227, 84 L.Ed. 716, 60 Sup.Ct. 472 (1940); *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 Sup.Ct. 274 (1960); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d 974 (1966).

4. The decision below finding Petitioner's confession to be voluntary, where there is unrebutted evidence of a threat of physical violence to secure the confession, conflicts with the decisions of this Court which find the privilege against self incrimination waived only where an accused chooses to speak in the *unfettered* exercise of his own will. *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 Sup.Ct. 1489 (1964); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d, 974 (1966). No reasonable view of the record in this case permits finding Petitioner's confession to have been an unfettered exercise of his will where it was immediately preceded by a threat of physical violence, notwithstanding advice of constitutional rights by the interrogators and the intelligence of the accused.

5. The decision below disregarding Petitioner's unrebutted testimony of a threat of physical violence preceding his confession conflicts with the decision of this Court that *any evidence* of threat or trick to secure waiver of the right against self-incrimination establishes that a defendant did not voluntarily waive this privilege, and requires reversal of a conviction obtained where the confession is put in evidence. *Miranda v. Arizona*, 384 U.S. 436,

16 L.Ed.2d 694, 86 Sup.Ct. 1602, 10 A.L.R.3d 974 (1966). Furthermore, where there exists physical violence or threat of it, there is no need to weigh or measure its effect on the will of the individual victim—the confession obtained as a result thereof is invalid. *Stein v. New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 Sup.Ct. 1077; reh.den., 346 U.S. 842, 98 L.Ed. 362, 74 Sup.Ct. 13 (1953).

6. The decision of the court below is erroneous and especially appropriate for review by this Court in that other than for Petitioner's illegally obtained confession, there did not exist any competent, substantial evidence to establish beyond reasonable doubt his guilt of the crime of conspiracy to commit grand larceny.

The incriminating extra-judicial declarations of Petitioner's co-defendants, made in the absence or without the knowledge of Petitioner after the alleged conspiracy had come to an end, were inadmissible in evidence to prove Petitioner's guilt. *Logan v. United States*, 144 U.S. 263, 36 L.Ed. 429, 12 Sup.Ct. 617 (1892); and cases cited, Annot., 4 A.L.R.3d 671 §3 (1965).

Only two witnesses knew of Petitioner's existence before his arrest. One testified to the fact that Petitioner made a number of phone calls to a co-defendant which she (the witness) thought to be in regard to a loan. (R.138, 145,148) Another witness identified Petitioner as having delivered a sum of money to him on the day after the crime in payment of a debt owed the witness by a co-defendant. (R.257,258,259,260)

No other witness, with the exception of the arresting and interrogating officers, knew of any connection Peti-

tioner had with the crimes with which he was charged. (R.31, 50-51,52,72,77,117,138,544,675,711,730,739,761,862-863)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY JAY BARTEL, ESQUIRE
1525 Alfred I. duPont Building
Miami, Florida 33131
and
JOE N. UNGER, ESQUIRE
1525 Alfred I. duPont Building
Miami, Florida 33131
Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1966

MALCOLM ROBERTS,
Appellant,

vs. CASE No. 65-505

THE STATE OF FLORIDA
Appellee.

Opinion filed June 28, 1966.

(Remainder of caption omitted)

The appellant, Malcolm Roberts, appeals a judgment and sentence thereon entered in the Criminal Court of Record for Dade County, Florida. He was informed against, tried, adjudged guilty and sentenced on two counts. The first count was upon a charge of conspiracy to commit grand larceny; the second count was for grand larceny. This appeal is a companion to the appeal of Louis Nash, Case No. 65-506, opinion filed this date. For the sake of brevity, we will not repeat the outline of the evidence set forth in that opinion. The appellant, Roberts, has presented five points for reversal.

Appellant's first point is:

"WHETHER THE TRIAL JUDGE ERRED IN FAILING TO GRANT APPELLANT, MAL-

COLM ROBERTS, A NEW TRIAL WHERE HIS CONVICTION WAS BASED, AT LEAST IN PART, ON THE CONTENTS OF A PRE-TRIAL STATEMENT, ADMITTED OVER OBJECTION, AND AS TO WHICH UNREBUTTED EVIDENCE PROVES WAS OBTAINED BY THREAT OF PHYSICAL HARM?"

The testimony of Roberts as to threats made in order to induce him to confess is as follows:

"Q. Did you discuss the case with them at that time?
A. Very little. Detective Rein took me around the corner into another room. He told me to remove my glasses.

Q. Mr. Rein did?
A. Detective Rein, that's right.

Q. Go ahead.
A. And he told me he was going to put me through the wall unless I answered some questions on this case.

Q. Did he? Did he hit you?
A. I took my glasses off.

Q. Go ahead.
A. And he moved right up to me.

Q. Did you answer any questions?
A. Did I answer any questions at that time?

Q. Yes.
A. No, sir.

Q. Even though the threatened to put you through the wall?
A. That's right.

Q. Who else was present when he threatened to put you through the wall?
A. Detective Rein took me out of the room that I was originally in with Captain Sandstrom and Detective Kegan, and took me around a corner to an isolated room.

* * *

Q. Now, did this occur, this threat by Detective Rein to send you through the wall, before or after you made a statement?
A. Before."

The State does not contend that this testimony is directly refuted in the record. However, it is urged that there was sufficient evidence before the Court upon which it could be found that the confession was freely and voluntarily given.

We hold that under the circumstances of this case the testimony above quoted was not sufficient to require, as a matter of law, a finding by the trial judge that the subsequently given confession was involuntary.

Appellant was taken into custody at about 4:00 P.M.; the statement was given at 5:35 P.M. on the same day. He was informed of the specific charge against him, and he was advised that any statement would be used against him. He was further advised that he should get a lawyer and a

bondsman. In fact, one of the officers called in appellant's behalf to find out what the amount of the bond would be.

The alleged threat was not accompanied by physical violence. The appellant showed every evidence of being an intelligent and well-informed person. The statement was given in a room in which there were several persons, and the appellant does not state that he was ever in fear, either at the time of the alleged threat or at the time of the statement. See Frazier v. State, Fla.1958, 107 So.2d 16. Cf., Harrison v. State, 152 Fla.86, 12 So.2d 307 (1942).

Appellant's points III and IV are directed to the sufficency of the evidence. The appellant and the State are in substantial agreement upon the facts shown by the record. Appellant's confession does not establish that he committed the crime of grand larceny, but it is sufficient, when taken with other facts in the record, to support his conviction of conspiracy to commit grand larceny. The confession establishes that he: (1) Conveyed messages between two persons concerning a "business deal" which he suspected was illegal; (2) received $300 for delivering a bag containing $1,000. In addition, two witnesses testified as to appellant's participation in the scheme; their testimony in this regard is that Roberts made several telephone calls to Rosen, one of the active participants in the crime, and that Roberts received $300.00 from him.

There is no doubt from this record that a conspiracy to commit grand larceny existed, and this conclusion may be reached without reference to the confessions of appellant's co-conspirators. There is sufficient evidence to connect Roberts with the conspiracy. The appellant was cognizant of a criminal intent, and by his continued partici-

pation he became criminally liable. See Pine v. U.S., 135 F.2d 353 (5th Cir.1943); 15 C.J.S. Conspiracy § 39. Cf. Meyers v. State, 43 Fla. 500, 31 So.275 (1901). We find the evidence sufficient to support the conclusion of the jury that appellant's actions were inconsistent with any reasonable hypothesis of innocence. Cf. State v. Trafficante, Fla. App.1961, 136 So.2d 264.

Upon the other hand we do not find the evidence sufficient to convict this appellant of grand larceny. The conviction upon the grand larceny count must be reversed upon authority of the rule in Ricard v. State, Fla.App.1966, 181 So.2d 677.

The last point to be considered is appellant's contention that the court erred in permitting the jury to take informations into the jury room without first deleting the names of other defendants who were not being tried. It is proper for the judge to permit the jury to take the information to the jury room. See Hall v. State, 119 Fla. 38, 160 So. 511 (1935); Fla.Stat.1963, § 919.04; annot. 120 A.L.R. 463. No case has been cited which creates an exception when other defendants, not being tried, are included in the indictment or information. In addition, the appellant fails to show how he was in any way prejudiced by the action of the trial judge. See Lamb v. State, 90 Fla. 844, 107 So. 530 (1925).

The judgment and sentence of the appellant Malcolm Roberts for the crime of conspiracy to commit grand larceny is affirmed. The judgment and sentence of appellant Malcolm Roberts for the crime of grand larceny is reversed and he is discharged therefrom.

Affirmed in part and reversed in part.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
NO. 65-505

PETITION FOR REHEARING

(Dated July 13, 1966)

Appellant, MALCOLM ROBERTS, requests rehearing or reconsideration of that portion of this Court's opinion in the above-styled cause which affirmed the judgment and sentence of appellant for the crime of conspiracy to commit grand larceny.

In support thereof, it is respectfully suggested that in affirming this portion of the sentence and judgment, based upon the pre-trial statement of appellant, this Court failed to consider the strict guidelines collated and reiterated by the Supreme Court of the United States on June, 13, 1966, in *Miranda v. Arizona*, U.S. , 16 L.Ed.2d 694, 86 S.Ct. (1966):

(1) Coercion can be mental as well as physical;

(2) Confession must be unfettered exercise of will;

(3) Confession obtained by compulsion must be excluded whatever the character of compulsion;

(4) Individual's right to choose between silence and

speech must remain unfettered throughout the interrogation process;

(5) Waiver of the right to remain silent must be demonstrated by prosecution; and

(6) Any evidence that the accused was threatened, tricked, or cajoled into waiving the privilege to remain silent establishes that accused did not voluntarily waive his privilege, and renders any confession so obtained inadmissible.

Here, there is no evidence that the confession of appellant was freely and voluntarily given. There is unrebutted evidence of a threat of physical violence preceding the confession obtained. That the threat was not accompanied by physical violence is of no import. *Miranda v. Arizona*, supra, at page 709. That appellant is an intelligent and well-informed person is of no import. *Miranda v. Arizona*, supra, at page 720. That the statement was given in a room in which there were several persons is not nearly as significant as the fact that appellant was removed to an isolated place for the explicit purpose of being threatened.

Under any or all of the constitutional safeguards surrounding the admission of a pre-trial confession recently reiterated in the *Miranda* case, there was plentiful evidence, never rebutted by the State, that "... but for the improper influences he would have remained silent....". *Miranda v. Arizona*, supra, at page 716.

More important, the long-standing rule is reaffirmed that in order for a confession to be admissible into evidence, the proof must be sufficient to establish that the making of the statement was voluntary.

It is respectfully submitted that the error committed by this Court in the instant case is fundamental to the law of confessions. Whether through inadvertence or oversight, this Court has placed the burden of proving involuntariness on an accused, rather than placing the burden on the State to prove voluntariness.

With the failure of the State to sustain its burden of establishing that appellant's confession was voluntary, when faced by unrebutted evidence of coercion, this Court erred in failing to grant a new trial for the conspiracy conviction regardless of the other evidence to support guilt.

Other than the confession, however, there did not exist sufficient, nor any, competent evidence, to connect appellant with the conspiracy.

Of all the witnesses who testified at trial, only two even knew of Malcolm Roberts before his arrest. The testimony of neither was sufficient to establish his guilt beyond a reasonable doubt as is required by the law of Florida.

Patricia Louise Yoder was the secretary and sometime girlfriend of Sherwood Rosen (R.135-136,137). She stated that she never knew Mr. Roberts before the trial (R.138). Upon inquiry as to what occurred in April of 1964, relative to the case, she responded that "there was a lot of calls from this Mel, which I later found out was Mel Roberts." (R.145) The witness was then asked whether she had any conversation with her boss, Sherwood Rosen, about these phone calls that were being exchanged between himself and this man known as Mel. She responded that he had told her these calls were *in regard to*

a loan. (R.148) At one other point in her testimony, Mrs. Yoder stated that Rosen gave "Mel" $300 "because he needed it for food for his wife and children." (R.159) Finally, she testified that she was told by Rosen that a phone number appearing on the back of a card taken from his wallet "was Mel's number." (R.195)

This is the sum total of the evidence supplied by Mrs. Yoder to connect appellant, Malcolm Roberts, with the crime of conspiracy to commit grand larceny. That such evidence falls far short of supplying substantial proof requires no elaboration.

Witness, Howard Bressler, operated a business known as the Imperial Lounge and Bar at 93 NW First Street, in Miami. (R.257) On April 16, 1964, Mr. Bressler had gone to the home of Sherwood Rosen to seek payment of a $200 loan which Bressler had previously made to Rosen (R.258). Rosen informed Bressler that somebody was going to drop money off at his place of business *in payment of the loan.* A person did come into his place of business the morning after the crime and left some money for Bressler. Bressler identified Malcolm Roberts as the person delivering the money in payment of the debt of Sherwood Rosen (R.259-260). This is the extent to which any part of Bressler's testimony involved Malcolm Roberts.

Without sufficient evidence to connect appellant with the conspiracy other than that contained in his own confession, it was error for this Court to affirm the conviction upon the conspiracy count.

(Signature and Certificate of Service Omitted)

APPENDIX C

(TITLE OMITTED)

DENIAL OF PETITION FOR REHEARING.

(Dated July 21, 1966)

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A TRUE COPY
ATTEST:
WILLIAM P. CARTER

Clerk District Court of
Appeal, Third District

BY LOUIS J. SPILLONE (SEAL)
Chief Deputy Clerk

cc: Joe N. Unger
James T. Carlisle
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

APPENDIX D

Amendment XIV. — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

(TITLE OMITTED)

ADDITIONAL ASSIGNMENTS OF ERROR

(Dated November 19, 1965)

IN THE CRIMINAL COURT OF
RECORD IN AND FOR DADE
COUNTY, FLORIDA
CASE NO. 64-3846-A

Pursuant to the Order of the District Court of Appeal of Florida, Third District, dated November 10, 1965, De-

fendant, MALCOLM ROBERTS, herein submits additional assignments of error upon which he intends to rely in the prosecution of his appeal in the beforementioned court. These assignments of error supplement and are in addition to those assignments of error previously filed on behalf of co-defendant, LOUIS NASH, (Criminal Court of Record, Case No. 64-3621-B) which the Order of the District Court of Appeal of Florida, Third District, dated June 22, 1965, made applicable to all Appellants in Cases Nos. 65-505, 65-506, 65-507:

1. The trial court erred in admitting into evidence the pretrial statement of defendant, MALCOLM ROBERTS, made to the investigating officers on April 24, 1964.

2. The trial court erred in entering its adjudication of guilty against the defendant, MALCOLM ROBERTS, which adjudication of guilty was based in part upon the contents of a pre-trial statement made by MALCOLM ROBERTS to investigating officers on April 24, 1964.

(Signature and Certificate of Service Omitted)

APPENDIX F

(TITLE OMITTED)

ORDER OF SUPREME COURT DENYING CERTIORARI

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1967, TUESDAY, APRIL 11, 1967

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

Test: (Seal omitted)
Sid J. White
Clerk Supreme Court.

APPENDIX G

(TITLE OMITTED)

DENIAL OF REHEARING BY SUPREME COURT

(Dated May 17, 1967)

On consideration of the petition for rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST: (Seal omitted)

SID J. WHITE
CLERK SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 371

LOUIS NASH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE [redacted] DISTRICT COURT OF APPEAL OF FLORIDA THIRD DIST.

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

LOUIS NASH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

LOUIS NASH, Petitioner herein, by and through his undersigned attorney, respectfully prays that this Honorable Court issue its Writ of Certiorari to review the opinion and judgment of the District Court of Appeal of Florida, Third District, dated June 28, 1966; the order of the Supreme Court of Florida denying certiorari entered on the 31st day of January, 1967, and the order of the same Court of the 8th day of March, 1967, denying Petition for Rehearing.

OPINIONS OF THE COURT BELOW

The opinion and judgment of the District Court of

Appeal, Third District; entered June 28, 1966, is reported in 188 So.2d, page 391, and reported as **Louis Nash, Appellant v. The State of Florida, Appellee.** A copy is attached as APPENDIX A.

The Order of the Supreme Court of Florida denying Certiorari was entered on the 31st day of January, 1967. A copy is attached as APPENDIX B.

The Order denying petition for rehearing was entered by the Supreme Court of Florida on the 8th day of March, 1967. A copy is attached as APPENDIX C.

Mr. Justice William J. Brennan, Jr. extended the time for filing Petition for Writ of Certiorari to and including July 15, 1967.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 USC Sec 1257(3).

QUESTIONS PRESENTED

I

WHETHER A DENIAL OF DUE PROCESS RESULTED FROM ADMISSION INTO EVIDENCE OF ALLEGED CO-CONSPIRATORS' PREJUDICIAL STATEMENTS MADE PRIOR TO THE FORMATION AND SUBSEQUENT TO THE TERMINATION OF A CONSPIRACY.

II

WHETHER A DENIAL OF DUE PROCESS OF LAW RESULTED FROM A STATE COURT CONVICTION FOR A CRIMINAL OFFENSE WITHOUT ANY EVIDENCE INDICATING PETITIONER'S PARTICIPATION IN THE CRIME CHARGED.

III

WHETHER A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS WAS EFFECTED BY THE FAILURE TO DISMISS A CONSPIRACY CHARGE WHEN AN APPELLATE COURT REVIEWING THE RECORD FOUND THAT THERE WAS NO EVIDENCE UPON WHICH THE PETITIONER COULD BE FOUND GUILTY OF THE SUBSTANTIVE CHARGE AND WHERE THE SOLE FACT AT ISSUE IN THE SUBSTANTIVE CHARGE WAS IDENTICAL TO THE FACT AT ISSUE IN THE CONSPIRACY CHARGE AS IT PERTAINED TO PETITIONER.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the United States Constitutional Amendment No. 14, Section One, as follows:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT

OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES INVOLVED

The Florida Statutes involved in this petition are Florida Statutes, 1965 ch. 811.021 as follows:

"A person who, with intent to deprive or defraud the true owner of his property or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: (a) takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, per-

> sonal property, goods and chattels, thing in action, evidence or debt, contract, or property, or article of value of any kind, or: (b) having in his possession, custody or control, as a broker, bailee, servant, attorney, agent, employee, clerk, trustee, or officer of any person, association, or corporation, member of co-partnership, pool or joint adventure, or as a person authorized by an agreement, or by competent authority; to hold or take such possession, custody, or control, any money, personal thing or action, goods and chattels, evidence of debt, contract, property, or article of value of any kind, appropriates the same to his own use, or that of any other person, other than the true owner or person entitled to the benefit thereof; . . . . "

and Florida Statutes, 1965, ch. 833.04, recited as follows:

> "If two or more persons shall agree, conspire, combine or confederate to commit any other felony they shall be guilty of a felony and punishable by imprisonment in the state prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the state prison for one year, whichever may be the greater."

STATEMENT OF THE CASE

Petitioner was accused jointly with other co-defendants of a conspiracy to commit grand larceny and of the substantive crime of grand larceny.

He was convicted by a jury on both counts. Petitioner was sentenced to fifteen months on the conspiracy charge. The conviction on the charge of grand larceny was reversed by the Florida District Court of Appeal, Third District, which held that the evidence was insufficient to establish the guilt of Petitioner. The Court held that where circumstantial evidence was relied upon, the evidence must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence. (APPENDIX A).

The salient facts are simple: Nash engaged in discussions with agents concerning the sale to them of liquor. The record discloses without contradiction that the discussions were limited to the sale of "island whisky" or "untaxed whisky". *(TR 10-11, 16-26, 29-31, 43, 48, 50, 52, 70, 71, 77.)

There was not one word of evidence indicating Nash's knowledge that the whisky involved was stolen. At the trial the lengthy confession of a co-defendant, Sherwood Rosen, was presented to the jury. (TR 285, 287, 289, 409; confession, 412, 443, 446, 456, 457, 460). That confession made after the sale had been completed was by definition post-conspiratorial. It contained statements which indicated that the arrangements to steal the whisky had been made long prior to the time that Petitioner-Nash had any part in the proceedings. That phase of the confession was, therefore, inadmissible as having been made after the formation of the conspiracy, if there had been one, and also because it discussed events which had taken place prior to any participation by Nash.

*TR represents pages in the transcript of testimony which are part of the record on appeal.

Another confession, prejudicial to Petitioner, post-conspiratorial in nature, was admitted in evidence. That confession was coerced. It is the subject matter of a Petition for Writ of Certiorari presently pending in this court under the style of:

Malcolm Roberts, Petitioner
v.
The State of Florida, Respondent.

No evidence of any kind, whether by way of confession or otherwise, denies the following:

a) Rosen and Shay had arranged the theft of liquor with discussions that began long before any conversation was had with Nash, or anyone else.

b) The arrangement to steal was completed and the theft was completed without Nash.

c) Nash did not know Rosen or Roberts.

d) No one stated or inferred that Nash knew the whisky involved was stolen.

e) Nash's only participation was in arranging for the sale of the whisky to others, after arranging to buy it from Shay.

Petitioner concedes that the record discloses that Nash was involved in the ultimate second sale to third parties.

The only material fact at issue is whether or not Nash knew of and participated in the theft. He was not charged with illegal sale of whisky.

The Federal questions presented by this Petition were originally raised in the trial court. They were raised by objections to the introduction of confessions and statements of alleged co-conspirators on the grounds that Federal and Constitutional rights, and in particular the Sixth and Fourteenth Amendments were being violated. Additional specific objections to the introduction of coerced confessions were raised at the trial (TR 639-641).

The Court permitted the introduction into evidence of the confessions (TR 644). The Federal questions were also raised by motion to strike (TR 567).

The motion was denied (TR 570). The confession itself disclosed Roberts participation in the crime charged (TR 646-654).

REASONS FOR GRANTING THE WRIT

This Court has been particularly sensitive to the dangers of prejudice and deprivation of a fair trial caused by preconspiratorial and post-conspiratorial hearsay statements implicating another co-conspirator when unaccompanied by a proper cautionary instruction. **Delli Paoli v. U. S. 352 U.S. 232 (1957); Fiswick v. U. S. 329 U.S. 211 (1946); Krulewitch v. U. S. 336 U.S. 440 (1949); Wong Sun v. U. S. 371 U.S. 471 (1963).**

The charge of the Court to the jury when read as a whole (APPENDIX E) discloses that the jury was not

sufficiently advised that statements by co-defendants and actions of co-defendants were not to be considered at all with reference to the Petitioner unless and until the jury determined that a conspiracy in fact existed and that the conspiracy involved the theft and not just the sale of whisky. No one contended that Nash was directly involved in the theft. No one denied that Nash was directly involved in the sale. Since the liquor was in fact stolen as reflected by the Record, Nash could only be found guilty of conspiracy to commit larceny if he participated in the **theft** and not just the **sale.** He could only have been convicted of conspiracy to commit the theft if he knew the whisky was to be stolen. In the absence of direct testimony, that fact would have to be shown with no reasonable contrary hypothesis. There is no other single fact that would **link** him as a participant in the conspiracy to commit larceny or **deny** his participation in the conspiracy to commit larceny.

Petitioner readily concedes that inconsistent findings are possible on different counts in most criminal proceedings, but, in this case, when the District Court of Appeal, Third District, and not the jury found that there was no sufficient evidence to link him with the theft, that Court necessarily found that the single fact of knowledge of the theft was absent. In this case, therefore, there can be no evidence existing in the record that could link Petitioner to the conspiracy to commit the theft.

In **Shuttlesworth v. Birmingham, 382 US 87, 15 L ed 2d 176 86 S Ct 211,** this Court held that a conviction violates due process when there is no evidence whatever in the record to support it. The reversal of the substantive

count by the District Court of Appeal of Florida, Third District, is based on a finding that there is no evidence whatsoever in the record to support the conviction. Such conclusion necessarily flows from the fact that the Appellate Court struck down the finding of the jury. See also **Thompson v. City of Louisville, 362 U.S. 199, 4 L Ed 2d 654, 80 SC 624, 80 ARL 2d 1355.**

As this Court stated in Shuttlesworth v. Birmingham, supra:

> "The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 US at 199, 4 L ed 2d at 655, 80 ALR 2d 1355. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt."

The record absent the post conspiratorial statements of Rosen and Roberts could not even inferentially point to a knowledge by Petitioner that the whisky involved was to be stolen. The potential prejudicial effect of such post-conspiratorial evidence has impelled other courts, both before and after **Delli Paoli**, supra, to reverse convictions. See **eg. Schaffer v. U. S. 221 Fed. 2d 17 (5th Cir.**

1955); Barton v. U. S. 263 Fed 2d 894 (5th Cir. 1959); Abbate v. U. S. 247 Fed. 2d 410 (5th Cir. 1957); Mora v. U. S. 190 Fed. 2d 749 (5th Cir. 1951); U. S. v. Jacangello 281 Fed. 2d 574 (3rd Cir. 1960); U. S. v. Gordon 253 Fed. 2d 177 (7th Cir. 1958); Tripp v. U. S. 295 Fed. 2d 418 (10th Cir. 1961); Kramer v. U.S. 317 Fed. 2d 114 (D.C. Cir. 1963); U. S. v. Sansone 206 Fed. 2d 86 (2d Cir. 1953).

Petitioner urges the further invalidity of the Roberts post-conspiratorial confession as involved with such coercion as to prohibit its sanction in any court. Its effect was not only prejudicial upon Roberts but must of necessity have spilled over in the minds of the jury to Petitioner. See Mapp v. Ohio, 367 U.S. 643, 6 L ed 2d 1081, 81 S Ct. 1684, and cases cited therein.

CONCLUSION

Obviously, without either confession presented to the jury the only evidence, by inference or otherwise, concerning Petitioner, would be his participation in a sale of whisky, apparently untaxed, to third persons. It is impossible to determine, however, that "spill over" effect hearing the confessions of two other persons charged with the crime of grand larceny would have had upon the jury. It would not even matter whether Petitioner knew the liquor was stolen since the crime charged was not the sale of stolen whisky, but the commission of the grand larceny itself.

Bringing these people to court as co-defendants, and permitting the jury to hear two confessions of the crime of stealing the whisky, would certainly have had some effect upon the preconditioning of the jury in deciding

whether Nash also participated in the theft, although not one word of evidence indicates his participation in anything but the sale.

This record discloses no basis whatsoever for a conspiracy count when the identical jury charge, in toto, levied in the substantive count. This view is borne out by its reversal based on the identical fact.

For the foregoing reasons, Petitioner respectfully urges this Petition for Writ of Certiorari be granted.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139

APPENDIX A

District Court of Appeal of Florida
Third District

No. 65-506

LOUIS NASH, Appellant,

-v-

The State of Florida, Appellee.

"Per Curiam. The appellant was informed against, tried before a jury and found guilty of conspiracy to commit grand larceny and grand larceny. The sentences are fifteen months in the State penitentiary on the conspiracy to commit grand larceny and five years on the grand larceny, the sentences to run concurrently.

On this appeal, the appellant raises three points. The first point questions the sufficiency of the evidence to support the conviction of conspiracy to commit grand larceny. The second point questions the sufficiency of the evidence to support the conviction for grand larceny. The third point questions the sufficiency of the evidence as to both counts because of the claimed failure of the State to prove lack of consent on the part of the owner of the property which was stolen.

The facts are extremely lengthy and complicated. The testimony covers almost 1000 pages. We think that it is unnecessary to give a detailed statement of the evidence noted to determine this appeal. In general, it may be said that the evidence showed an attempt by the State Beverage Department, acting through its agents and cooperating conspirators, to purchase unlicensed "island" whiskey. The purpose of this effort was to discover the

source of untaxed whiskey which the agents knew was being brought into this State from the nearby islands.

In carrying out their plan, the agents were put in contact with the appellant Nash. Acting through him and others the agents discovered that they were able to purchase a truck load of whiskey which was not only untaxed but also stolen.

(1) There is sufficient evidence in this record to convince a jury that appellant Nash was a party to the conspiracy, and that he knew that the whiskey was to be stolen. There is also evidence which would support a finding by the jury that, after the crime was accomplished, Nash assisted in the delivery of the whiskey to the purchasers, who were actually agents but were not known by appellant to be such. We therefore reach the conclusion that the conviction upon the count charging conspiracy to commit grand larceny must be affirmed. See Pine v. United States, 135 F. 2d 353 (5th Cir. 1943); 15 C.J.S. Conspiracy § 39).

(2)(3) A consideration of the evidence upon the charge of grand larceny reveals that it is insufficient to establish the guilt of the appellant Nash. It is well established that where circumstantial evidence is relied upon for proof of guilt, such evidence must be not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence. State v. Trafficante, Fla. App. 1961, 136 So. 2d 264; Ricard v. State, Fla. App. 1966, 181 So. 2d 677.

(4) The State suggests that, because some of the physical evidence of the crime of larceny was not

brought to this Court, we are precluded from a determination of the sufficiency of the evidence to support the conviction of this appellant. A reading of the record convinces us that none of the physical evidence would have been relevent to the actions of this appellant to tend to show his participation in the crime of grand larceny.

The judgment and sentence of the appellant Louis Nash for the crime of conspiracy to commit grand larceny is affirmed. The Judgment and sentence of appellant Louis Nash for the crime of grand larceny is reversed and he is discharged therefrom.

Affirmed in part and reversed in part."

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1967

Tuesday, January 31, 1967

Case No. 35,596

LOUIS NASH, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

This cause having heretofore been submitted to the Court on Petition and Cross-Petition for Writs of Cer-

tiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date June 28, 1966, and the record having been inspected, it is ordered that said Petition and Cross-Petition be and the same is hereby denied.

THORNAL, C.J., THOMAS, ROBERTS, DREW, O'CONNELL, CALDWELL and ERVIN, JJ., concur to the denial of the Petition for Certiorari

THORNAL, C.J., THOMAS, DREW and CALDWELL, JJ., concur to the denial of the Cross-Petition for Certiorari

ROBERTS, O'CONNELL and ERVIN, JJ., dissent to the denial of the Cross-Petition for Certiorari

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

cc: Honorable W. P. Carter
Honorable J. F. McCracken
Honorable Max B. Kogen
Honorable James T. Carlisle

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

January Term A.D. 1967

Wednesday, March 8, A.D. 1967

Case No. 35,596

LOUIS NASH, Petitioner

-vs-

STATE OF FLORIDA, Respondent

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
Clerk Supreme Court

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JANUARY 31, 1967, IN THE ABOVE CAUSE)

APPENDIX D

AMENDMENT XVI. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

CHARGE TO JURY

THE COURT: Gentlemen of the jury, you have heard and considered the testimony and other evidence in this case and the arguments of counsel. It now becomes my duty to give you certain instructions as to the law which you are to apply to the facts as you find them from the evidence.

It is on this evidence and this alone that you are

to try the defendants. Under your oaths as jurors, you are calmly, fairly, and dispassionately to consider the testimony and other evidence in this case and the law as charged to you by the Court and from such evidence and law, and those matters only, arrive at your verdict. It is your province and duty to pass upon and to decide the disputed issues of fact. It is the Court's province and duty, however, to give you the law which you are to apply to those facts. You are not to be swayed in the performance of this duty by prejudice, sympathy, or any other sentiment, but you must try the case fairly and impartially on the evidence.

However, in the consideration of such testimony and evidence, you will bring to bear in your consideration in addition, all of that common knowledge of men and affairs which you, as reasonable men have and exercise in the everyday affairs of life.

There has been filed in this Court two Informations that charge the defendants, Louis Nash, Edmund Anthony Petrocine, Sherwood H. Rosen and Malcolm Roberts, together with other named individuals, as the defendants, charging each with in Count No. 1—each Information consists of two counts. No. 1, conspiracy to commit grand larceny, and Count No. 2, being the charge of grand larceny. Let me say right here that other than the defendants who are here before the Court, you are not to concern yourselves in any manner with the names of any other defendants appearing in the Information who are not before the Court. Their status has absolutely no meaning to you, and you are not to be concerned with that at all.

I would like to ask all counsel, do you waive the necessity of reading the Information?

MR. HAFT: Waive the reading.

MR. KOGEN: So waive, but we respectfully ask the Court to delete any other names, other than those who are defendants in this case, for the reason, I assume, that the jurors will be entitled to take the Information in with them.

MR. FERGUSON: To which the State will object.

MR. HAFT: I have no objections.

MR. FERGUSON: All the names should remain on the Information, and nothing should be deleted.

MR. DUNCANSON: May I ask if the jurors — are you going to allow them to take the Informations with them?

THE COURT: Yes.

MR. DUNCANSON: Then I will waive.

THE COURT: With that stipulation, the necessity of the Court reading the Information — I will not read it in detail, and I will further instruct you at the time that you go into the jury room that you have someone read it.

MR. FERGUSON: Has your Honor ruled on Mr. Kogen's request?

THE COURT: I am going to overrule the objection.

MR. FERGUSON: That you, sir.

THE COURT: To the Informations the defendants have each entered a plea of not guilty — to each count of each Information — which makes up the issues which you are to try. The State by the Information is charging the accused, and the defendants by their plea of not guilty are denying every material allegation of such Informations.

The Informations themselves are not evidence, but a mere formal accusation of the defendants. You are not to consider them as evidence of the defendants' guilt, and you shall not permit yourselves to be influenced by the fact that an Information has been filed against the defendants.

The Statutes under which these defendants are charged with having violated are Section 811.021 of the Florida Statutes, which is entitled, "Larceny, defined, penalties, sufficiency of indictment and information or warrant." It reads as follows:

> "A person who, with intent to deprive or defraud the true owner of his property or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: A, takes from the possession of the true owner, or of any other person, or obtains from such person possession by color or aid of fraudulent or false representations or pretence, or of any false token or writings, or obtains the signature of

any person to a written instrument, the false making whereof would be punishable as perjury, or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind, or: B, having in his possession, custody or control, as a broker, bailee, servant, attorney, agent, employee, clerk, trustee, or officer of any person, association, or corporation, member of co-partnership, pool or joint adventure, or as a person authorized by an agreement, or by competent authority, to hold or take such possession, custody or control, any money, personal thing or action, goods and chattels, evidence of debt, contract, property, or article of value of any kind, appropriates the same to his own use, or that of any other person, other than the true owner or person entitled to the benefit thereof, or C,—

Let me interrupt at this point to ask—C Section pertains to—

MR. KOGEN: Waive that as not being applicable.

THE COURT: That is for all defendants?

MR. HAFT: Right.

MR. DUNCANSON: Yes.

MR. SEPE: No objection.

THE COURT: We will omit Section C, and then in paragraph numbered 2 of that section:

> "If the property stolen is of the value of $100.00 or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the State Penitentiary not exceeding five years, or in the County Jail not exceeding twelve months, or by fine not exceeding $1,000.00.
>
> "3, if the value of the property stolen as mentioned in the preceding section is less than $100.00, the offender shall be deemed guilty of petty (sic) larceny, and upon conviction, shall be punished by imprisonment in the County Jail not exceeding six months or by fine not exceeding $300.00.
>
> "4, hereafter it shall not be a defense to a prosecution for larceny or for an attempt or for conspiracy to commit the same or for being an accessory thereto if the purpose for which the owner was induced by color of aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof was illegal, immoral or unworthy."

Paragraph 5 goes to sufficiency of the indictment and information and paragraph 6—can we waive the necessity of reading that?

MR. HAFT: Yes.

MR. KOGEN: Yes, sir.

MR. DUNCANSON: Yes.

THE COURT: Those paragraphs I will not read from 811.021 of the Florida Statutes.

That is the Statute which the defendants are charged under in Count No. 2 of the Information with violating, and Count No. 1 of the Information is allegedly a violation of Section 833.01 of the Florida Statutes, entitled, "Conspiracy."

> "If two or more persons shall agree, conspire, combine or confederate, one, to commit any offense two, falsely —"

These defendants are charged under Sections 833.04 of the Florida Statutes. I will not read Section 833.01 of the Statutes at all.

Section 833.04 is entitled, "Conspiracy to commit other felony, other than a capital offense," or a felony which is punishable by imprisonment for life.

> "If two or more persons shall agree, conspire, combine or confederate to commit any other felony other than those punishable by death or imprisonment, they shall be guilty of a felony and punishable by imprisonment in the State Prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the

State Prison for one year, whichever may be the greater."

Those are the two Statutes which the defendants are charged with violating.

MR. FERGUSON: May we step forward before before you a minute, sir?

THE COURT: All right.

(Informal discussion off the record.)

MR. KOGEN: I will waive that.

MR. FERGUSON: No.

THE COURT: I will say then, if I did not — let me just say in defining this "Or any other felony, other than a felony punishable by death or imprisonment for life —" it seems I left off the, "Imprisonment for life." This Section here becomes material only because it is relating to those other felonies. I think what I had better do is read the entire section once more through.

Section 833.04 of the Florida Statutes is what I am reading now.

"If two or more persons shall agree, conspire, combine or confederate to commit any other felony —"

Meaning any felony other than those punishable by death or imprisonment for life.

> "— shall be guilty of a felony and punishable by imprisonment in the State prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the State Prison for one year, whichever may be the greater."

Those are the Florida Statutes under which the defendants are charged.

Notwithstanding these Informations, the defendants on trial, as do all defendants in criminal cases, come into this Court clothed with the presumption of innocence, which remains and abides with them throughout the trial, unless and until the State has, by competent evidence, convinced the mind of each individual juror of the guilt of the accused beyond a reasonable doubt.

The burden of proof is upon the State to prove all of the material allegations in the Informations beyond a reasonable doubt, and if the State does that, it is your duty as jurors, under your oaths, to find the defendants guilty, but if the State fails to do that, then under your oaths as jurors, you are to give the defendants the benefit of any reasonable doubt and acquit them.

By reasonable doubt is meant a real doubt arising from the evidence or lack of evidence in the case, and not a mere fanciful or imaginary doubt, but one for which you can give your minds and consciences a satisfactory reason after considering all of the facts and circumstances of the case. It is that stage of the case, which

after a consideration of the entire testimony the jurors' minds are in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

You are the sole and exclusive judges of the evidence and of the credibility of the witnesses. It is your duty, if you can do so, to reconcile any conflicting testimony as to make all of the witnesses speak the truth. If you cannot do so, it is your duty to determine which witness has spoken the truth. In determining the credibility of a witness, it is proper that you take into consideration the manner of the witness on the Stand, his candor or want of candor, his intelligence or otherwise, the reasonableness or unreasonableness of his testimony, his interest, if any he has, in the outcome of the case, the means and opportunity of the witness for knowing the facts about which he has testified, and all of the other circumstances surrounding such witness at the time of the giving of his testimony and at the time of the happening of the events about which he has testified.

Now, it has been observed by the jury that the defendants did not take the Stand in their own defense; that is a fact of passing interest only. The failure of the defendant to testify in his own behalf, has no evidenciary significance, and no unfavorable inference should be drawn from such failure. It is strictly a defendant's privilege to testify or not to testify if he likes. These defendants entered this trial with a presumption of innocence in their favor, and it was not their obligation to sustain this presumption. It was the prosecution's duty to overthrow it in order to warrant the finding of guilt.

There has been presented to you certain confessions or statements of the defendants in this case. The confession or statement made by a principal or an aider and abettor may be introduced by the prosecution as a part of the State's case, but you are instructed that you must consider the confession or statement only in connection with the guilt or innocence of the defendant who gave or made the same, and that you must not consider it in connection with the guilt or innocence of other defendants.

I further instruct you that where there are two or more persons charged in the same count of the Information with committing a felony of grand larceny, as principal in the first degree, it is permissible to show that one of the persons charged actually committed the felony of grand larceny and that the other person or persons were present aiding and abetting the commission of such felony of grand larceny, and they may be convicted under such charge and proof. Both or all are equally guilty, and it is not material as to which one is alleged to have actually committed the felony of grand larceny if it is duly proven that one committed the act and the other or others were present aiding and abetting the alleged felony of grand larceny.

I would further charge you, that if a person aids and abets another in the commission of a crime, he is as guilty as the party who commits that crime and is thus aided and abetted by him. The words aid and abet comprehend all assistance rendered by acts, words, encouragement, support or presence, actual or constructive to render assistance should it become necessary.

You are further instructed that if several persons combine together to commit the unlawful act of grand larceny, he is criminally responsible for the acts his associates committed in furtherance or prosecution of the common design; and if several persons combine to do the unlawful act of grand larceny, in the perpetration of the acts all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act of grand larceny they set out to accomplish.

Where two or more persons, acting with a common intent, jointly engage in the same undertaking and jointly commit the unlawful act of grand larceny, each is chargeable with liability and responsibility for the acts of all the others, each being guilty of the offense committed, to which he has contributed to the same extent as if he were the sole offender.

The Court instructs the jury that, "Conspiracy," as used in these instructions is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose.

The Court instructs the jury that by the term, "Common design," is meant community of intention between two or more persons to do an unlawful act, and it may be established by circumstances or by direct evidence of an expressed agreement, but before the conspiracy can be established by circumstances, the facts and circumstances tending to show such common design, conspiracy and the connection of the defendant therewith, must be established beyond a reasonable doubt by the evidence in the case, and when so established, such facts and circum-

stances must not only be consistent with each other and with the defendant's guilty connection therewith, but also absolutely inconsistent with any other reasonable theory.

Gentlemen, you are instructed that whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such an offense.

I would further instruct you that a conspirator is not criminally liable for every incidental result arising from the acts of the co-conspirators, but only for such as could have reasonably been foreseen.

I would further instruct you that in order to find any defendant guilty of the charge of conspiracy, his act or acts, as shown by the evidence adduced by the prosecution, must be a part of the ordinary and probable effect of the wrongful act agreed upon so that the connection between the act or acts of the defendants and the wrongful acts may be reasonably apparent. The wrongful act may not be a fresh and independent product of the mind of one of the confederates outside of and foreign to the common design. In other words, the act or acts of any conspirator must be directly related to the wrongful purpose in this case, the larceny of whiskey.

While the participation in a conspiracy by any defendant need not be shown by positive evidence, any inference of his participation must be shown by the

surrounding and accompanying circumstances of, or, in other words, any actions of any defendant must directly be a part of, the crime that is the common purpose of the conspiracy, in this case, the larceny of whiskey.

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty, whether the evidence be direct or positive or circumstantial, it will be your duty to render a verdict of guilty, but in order to convict a defendant on the circumstantial evidence, every essential fact or circumstance to the conclusion of guilt must be proved beyond a reasonable doubt. Such facts and circumstances must also be consistent with each other and must not only be consistent with the defendant's guilt, but must also exclude to a moral certainty every other reasonable supposition, except that of the guilt of the accused.

One who is instigated, induced or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing, may avail himself to the defense of entrapment (sic). Such defense is not available, however, where an officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent.

Entrapment (sic) is recognized as a valid defense, available to a person charged with the commission of a public offense under certain circumstances. It is a positive defense, the invocation of which necessarily assumes that the act charged was committed. Such entrapment (sic) is shown where it appears that officers of the law or their

agents incited, induced, instigated or lured the accused into committing an offense which he otherwise would not have committed, and had no intention of committing. In other words, if the criminal intent or design to commit the offense charged originates in the mind of the person who seeks to entrap the accused and to lure him into the commission of the crime merely for the purpose of arresting and prosecuting him, no conviction may be made. The practice of inducing or instigating the commission of a crime by an otherwise innocent person has been denounced as reprehensible and contrary to sound public policy.

The doctrine of entrapment (sic), however, has a limited application, the basic thought being that officers of the law or any other person shall not incite crime merely to punish the perpretrator (sic). Hence, a distinction has been made between the inducing of an innocent person to do an unlawful act, and the setting of a trap to catch one in the execution of a criminal plan of his own conception, the act of the latter character by any person not being regarded as against public policy, and entrappment (sic) is not available as a defense to a person who has the intent and design to commit a criminal offense, and who in fact does commit the essential act constituting it, merely because an officer of the law or other person in his effort to secure evidence against such person, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetration thereof. In other words, gentlemen, if any person goes to an innocent man and encourages him to commit a criminal act, that this man had no intention of committing except when induced by such person, that is against public policy and no conviction should be had. However, if a man is in the business of violating the law,

and any person induces or encourages or entraps him into committing a crime of the character that he has already been committing, then the defense of entrapment is not available, and if you believe him proven guilty of that beyond a reasonable doubt, you should convict him.

Now, the Defendant Petrocine has raised the defense of entrapment.

Though not looked upon with approbation, government inducement of crime is permitted by the Court primarily on the ground that it is necessary for the detection and prevention of a course of criminal activity which could not be otherwise be prevented. When government inducement is employed to entrap someone not engaged in such course of activity, it has not detected crime, but has merely helped to create it.

If you find from the evidence adduced by the prosecution, that the acts of the prosecution witnesses in contacting the Defendant Petrocine, were not prompted by any evidence, complaint or suspicion that the defendant was engaged in the sale of stolen whiskey, nor that any evidence adduced at the trial would indicate that the Defendant Petrocine was engaged in such a course of conduct, then you must find that the defense of entrapment is valid and the defendant must be found not guilty.

Now, the Court makes no intimation to you as to what has or has not been proved. That is a matter of fact solely within the province of the jury, and the jury is not to consider the various rulings of the Court during the trial as indicating that the Court's opinion of the guilt or innocence of the accused.

Let me simply say to you that there has been numerous objections and motions made throughout this trial by one side or the other — one counsel or the other, and the Court has been called upon — of course, this is the Court's function — to make rulings, either overruling or sustaining the objections or denying or granting certain motions to strike certain portions of the testimony. These are the rulings that I am referring to, and that you make no — draw no implication from the Court's view in making its ruling, and by the same token, you will not penalize any defendant or the State — no one whomsoever — by the fact they made these functions and raised these objections. This is their function to make objections as they think it gives them the right to do, and which they have the right to raise those questions. So you will not penalize anyone by virtue of these legal objections being made.

SUPREME COURT, U. S.

AUG 22 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967
No. 371
No. 347

LOUIS NASH
Petitioner
v.
THE STATE OF FLORIDA
Respondent
MALCOLM ROBERTS
Petitioner
v.
THE STATE OF FLORIDA
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

EARL FAIRCLOTH
Attorney General
State of Florida
Capitol Building
Tallahassee, Florida

JAMES T. CARLISLE
Assistant Attorney General
P. O. Box 640
Vero Beach, Florida 32960
Counsel for Respondent

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

OPINIONS BELOW

The Opinions of the Third District Court of Appeal and Orders of the Supreme Court of the State of Florida are adequately set out in the appendices to petitioners' briefs.

JURISDICTION

The Court's lack of jurisdiction will be made to appear under the argument section of this brief.

QUESTIONS PRESENTED

Petitioners have presented certain questions as being appropriate for consideration by the Court. Without doing violence to their position, it is respectfully submitted that the issues might be more appropriately considered if the questions were rephrased as follows:

I

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C., SECTION 1257?

II

WHETHER PETITIONER NASH WAS DEPRIVED OF. DUE PROCESS BY THE ADMISSION INTO EVIDENCE OF THE CONFESSIONS OF CO-CONSPIRATORS?

III

WHETHER THERE WAS ANY EVIDENCE INDICATING PETITIONER NASH'S PARTICIPATION IN A CONSPIRACY TO COMMIT GRAND LARCENY?

IV

WHETHER THE THIRD DISTRICT COURT OF APPEAL DENIED PETIT-

IONERS NASH DUE PROCESS UNDER THE LAW OF THE STATE OF FLORIDA RELATING TO THE CRIME OF CONSPIRACY WHEN IT HELD IN AFFIRMING HIS CONVICTION OF CONSPIRACY TO COMMIT GRAND LARCENY, THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION AND AT THE SAME TIME REVERSED HIS CONVICTION OF GRAND LARCENY ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT?

V

WHETHER PETITIONER ROBERT'S CONFESSION WAS PROPERLY ADMITED INTO EVIDENCE?

STATUTES INVOLVED

With the exception of Section 776.011 Florida Statutes, all pertinent Statutes and Constitutional Provisions are included in Petitioners' Brief.

"776.011 Principal in first degree. — Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commision of such offense."

STATEMENT OF THE CASE

Appellants Nash, Rosen, and Roberts were convicted of the crimes of conspiracy to commit grand larceny and grand larceny (R 990-994).

On March 24, 1964 (R 36), William Ivey of the State Beverage Department and Woodrow Gardner, a paid informer (R 31), inquired of one Petrocine whether he could furnish a load of whiskey to take to Jacksonville (R 39). Petrocine introduced Gardner to Nash (R 19). Nash asked Gardner if he could use one thousand cases of scotch (R 25). Gardner agreed to purchase the scotch (R 25).

On March 30, 1964, Ivey represented to Petrocine that he could not find Gardner and that he wished to do business (R 42). The following evening Petrocine told Ivey that Nash was going to make arrangements for the whiskey. On April 2, 1964, Nash told Ivey to return on April 6 and that they would then discuss the price and down payment (R 47).

On April 6, Nash advised Herman Fugate, a State Beverage Agent (R 56), and Gardner that the whiskey was "Hot" (R 63). On April 7, Nash informed Gardner that he had to purchase 1000 cases or nothing (R 70).

On or about April 12, one Jack Shea requested Roberts to contact Rosen to set up a business deal (R 648). Roberts called Rosen and said that he knew Rosen was in financial difficulty, and that he knew Rosen haulded a lot of liquor. Rosen was owner of Allapattah Transfer. Roberts then asked Rosen if he would like to make some money (R 415). A meeting was arranged between Rosen and Jack Shea (R 415). A few days later Rosen met Shea and advised

him that he would have approximately 1000 cases of liquor in his warehouse (TT 417). Subsequently, Roberts phoned Rosen to advise that they thought they could do it. Later Rosen met with Shea and Roberts at Tyler's Restaurant and was told that he could get $10,000 for his share of the deal (R 423). Rosen agreed to contact Roberts when they had some liquor in the warehouse (R 424). On April 14, Rosen called Roberts to say that they could go ahead with the deal (R 651). That evening Nash visited the home of Jack Shea (R 516).

On April 15, Rosen told his driver to go to the docks and load 1000 cases of a shipment of scotch for delivery to Austin Nichols, a local liquor distributor (R 426, 427). The truck with the whiskey was placed in the warehouse at about 4:30 that afternoon (R 435). The keys were left in it (R 436).

On the evening of April 15th, Rosen met with Shea and Roberts and gave Shea the keys to the warehouse (R 428). Rosen and one Rick, drove around for awhile and waited in Rosen's car. Rick directed Rosen to the vicinity of the Anchorage Bar where they parked. After a while Shea got in the car and gave Rosen back the keys and said the man is on the way with the money (R 433).

Meanwhile, on April 15, Ray Frederick, a State Beverage Agent, and Grafton Gray, an underworld figure who was working with the beverage agents, went to Nash's house (R 732). Nash, Frederick, and Gray went to 27th Avenue where State Beverage Agent Finley and Williams, posing as liquor law

violators, were waiting. These agents had the money for the whiskey (R 733). Nash told Frederick and Gray to signal Finley and Williams to follow (R 733). Nash directed the officers to the Anchorage Tavern (7 733). Nash got out of the car and talked to two white males in front of the tavern (R 734). These white males were Shea and Rick (R 434, 437). Nash then told Williams the whiskey was in the truck (R 734). Williams got in the truck. Shortly thereafter, Williams told Gray that the truck contained 1000 cases. Gray told Williams to go get the money. Williams obtained a leather bag with handles on it from Finley. The bag contained the money (R 735). The serial numbers of the bills had been recorded by the State Beverage Agents (R 832). The money in the bag had also been fixed, that is, some of the bundles of money were sandwiched with one dollar bills (R 852). Nash then told Williams to get in the truck and start it (R 735). Williams reported that there were no keys in the truck. Nash then went back to the tavern, talked with a white male, and returned with the keys. Williams drove the truck away. Nash said, "We better get out of here. That whiskey is pretty hot." (R 736). Nash then went back to the tavern and left the bag of money inside (R 736, 737). Thereafter, Frederick and Gray took Nash home and parted company (R 737).

In the meantime, Shea, Rick, and Rosen had gone to the tavern. Shea told Rosen to go inside and not to associate with them (R 437). Shea and Rick came in after Rosen (R 437) and began to play pool. After a while, Shea and Rick walked outside and came back carrying a satchel (R 438, 440). Shea, Rick, and

Rosen got in Rosen's car and they left (R 440, 441). Shea discovered that some of the bundles contained all one dollar bills (R 441). Rosen took Shea and Rick back to the restaurant where he had met them that evening (R 447). Later that night, Rosen received a call from Roberts to the effect that "the boys" were on their way to Palm Beach, and that they were "going to wait for the guy who was supposed to be buying the whiskey" (R 448).

Rosen's secretary, Pat Yoder, discovered the truck load of whiskey to be missing at 7:20 on the morning of April 16 (R 757). She called the police (R 157.

Roberts called Rosen early in the morning on the following Thursday. Rosen told him that he was desperately in need of money. Roberts said, "Well, I'll see what I can do. I'll tell these guys you got to have some money." Rosen further advised that he was meeting "them" downtown in the morning (R 450).

Roberts met Shea at the Justice Building. Shea gave Roberts a bag with $1000 in cash (R 652).

That same morning, Rosen called one Howard Bressler, owner of the Imperial Bar. Rosen told Bressler that someone was going to drop some money off (R 259). Later, Roberts gave Bressler a leather bag with money in it (R 259). Roberts told Bressler it was for Rosen (R 260). Bressler called Roberts and reported that the money had been delivered. Rosen told Bressler to keep $200 in payment of a debt owed Bressler by Rosen on a bad check, to give Rosen's secretary, Pat Yoder, $200, and to deposit $300 in

Bressler's bank account (R 261). Rosen authorized Roberts to keep $300 for himself (R 452).

Bressler gave Pat Yoder $200 plus the leather bag (R 261, 160). Bressler told Pat Yoder to throw away the leather bag or get rid of it (R 162). When she later mentioned to Rosen that she still had the leather bag, Rosen told her to "get rid of it. Get rid of it fast." (R 164).

The next day, Friday, Rosen asked Bressler for the $300 Bressler had deposited. Bressler withdrew the money from the bank and gave it to Rosen. Rosen gave Bressler a check for $500. Rosen owed Bressler $200 because a previous check had bounced. Rosen said, "In case somebody was to say something, where I got the money from, just hold the check for me and say that I borrowed it from you." (R 262).

William Powers of the Sheriffs Office examined the lock on the warehouse. He stated that it did not appear that the lock had been forced (R 264), although there were superficial (R 255) jimmy marks on it (R 247). Deputy Powers was of the opinion that entry was not gained by forcing the lock (R 254). Detective Rein made the same observation (R 399).

Meanwhile, beginning on April 15, prior to the larceny and on two occasions after the larceny, Nash visited the home of John Gray in West Palm Beach. Gray was not at home and Mrs. Gray gave Nash $600 on his first visit and told him that her husband had left town. The next morning at about 1:00 Nash and four or five other men went Gray's home and in-

quired as to Gray's whereabouts (R 686). Nash was upset because Gray had not given him the right amount of money (R 687, 688). On the third visit, Nash told Mrs. Gray that the men who had been with him on the previous night had wanted to take her and the children from the house, but that he wouldn't let them (R 689). Nash made several phone calls to the same effect.

Nash was arrested on April 17 (R 709). The serial numbers of the currency that he had in his wallet (R 462) at the time of his arrest (R 473-475) corresponded with the serial numbers (R 558, 560, 561) of the bills that the beverage agents had previously recorded (R 560). The record does not reflect whether these bills were used in the purchase of the whiskey or given to Nash by Mrs. Gray.

Roberts and Rosen were arrested (R 405). Roberts made a statement, which was admitted into evidence, concerning his participation in setting up the meeting between Rosen and Shea and his delivery of the money to Bressler (R 646-654). Rosen likewise made a statement, which was admitted into evidence, concerning his participation in the crimes charged (R 412-459).

Nash again referred to the whiskey as being "hot" during a telephone conservation to Gardner (R 829).

ARGUMENT

POINT I

THE COURT HAS NO JURISDICTION UNDER TITLE 28, U.S.C. SECTION 1257.

It is essential to the jurisdiction of the United States, Supreme Court under Title 28, U.S.C. Section 1257, that a substantial Federal question has been properly raised in the State Court proceedings, *Beck v. Washington,* 369 U.S. 541 The Petition for Writ of Certiorari filed on behalf of Petitioner Nash, alleges a denial of due process from the admission into evidence of an alleged co-conspirator's incriminating statement and a denial of due process due to an alleged insufficiency of evidence. It is conceded that throughout all of the State Court proceedings, Petitioner Nash has asserted the alleged insufficiency of evidence. However, it is apparent on the face of the record that petitioner Nash raises, for the first time, the question of a deprivation of due process due to the admission into evidence of a co-conspirator's incriminating statement in the Petition for Writ of Certiorari filed before this Court.

This is apparent from the record. The record (R 953) reflects that "upon stipulation of respective counsel, the Court ordered the above-styled and numbered case consolidated for the purposes of trial." The record also reflects that no mention of this alleged deprivation of due process is contained in petitioner Nash's Motion for New Trial (R 986, 987). Petitioner Nash's Assignments of Error are equally silent in this regard (R 998-1000). The Petition for Rehearing filed before

the Third District Court of Appeal of Florida also contains no mention of this alleged wrong-doing on the part of the Trial Court. The Opinion of the Third District Court of Appeal states as follows:

> "On this appeal, the appelant raises three points. The first point questions the sufficiency of the evidence to support the conviction of conspiracy to commit grand larceny. The second point questions the sufficiency of the evidence to support the conviction for grand larceny. The third point questions the sufficiency of the evidence as to both counts because of the claimed failure of the State to prove lack of consent on the part of the owner of the property which was stolen." 188 So.2d 391.

The Petition for Writ of Certiorari to the District Court of Appeal Third District contains no mention of this question. Thus, it must be concluded that Petitioner Nash, prior to this time, has never raised this question in any State Court.

Surely this Court does not regard the question of the sufficiency of the evidence to support petitioner's conviction for conspiracy to commit grand larceny as being a substantial Federal question. At least it should not regard this question as being substantial as long as there is some evidence which can support the verdict. Were this not the rule, this Court would be just another appellate court.

POINT II

PETITIONER NASH WAS NOT DEPRIVED OF DUE PROCESS BY ADMISSION INTO EVIDENCE OF THE CONFESSION OF A CO-CONSPIRATOR.

The record reflects that any references to petitioner Nash in Rosen's confession were deleted with the State's concurrence. (R 443). Rosen's confession was, therefore, free of any reference to petitioner Nash with the possible exception of a statement that" . . . this looks like that guy Lou's car," which was apparently overlooked by the Clerk. (R 443).

Robert's confession (R 646-654) contains absolutely no reference to Petitioner Nash. In *Paoli v. The United States*, 352 U.S. 232, it was held:

> "If Whitley's confession had included no reference to petitioner's participation in the conspiracy, its admission would not have been open to petitioner's objection. Similarly, if the trial court had deleted from the confession all references to petitioner's connection with the conspiracy, the admission of the remainder would not have been objectionable."

As is apparent from the above, Robert's confession contained no reference to Petitioner Nash's participation in the conspiracy. Again, as pointed out above, all references to Petitioner Nash's connection with the conspiracy were deleted from Rosen's confession with the exception of the rather obscure reference "This looks like that guy Lou's car."

> The Court in its charge to the jury instructed that ". . . you are instructed that you must consider the confession or statement only in connection with the guilt or innocence of the defendant who gave or made the same, and that you must not consider it in connection with the guilt or innocence of other defendants." (R 894)

It is respectfully submitted that the sole reference to petitioner Nash was so oblique as to preclude any possible prejudice. It is also respectfully submitted that the Court's charge to the jury was sufficiently clear to dispel any hint of prejudice. Therefore, petitioner Nash was not deprived of due process by admission of the evidence of the confession of co-conspirators. *Paoli v. The United States, supra.*

POINT III

THERE WAS AMPLE EVIDENCE INDICATING PETITIONER NASH'S PARTICIPATION IN THE CONSPIRACY TO COMMIT GRAND LARCENY.

It cannot be doubted that a conspiracy to commit grand larceny was in existence. Once the existence of a conspiracy has been established, slight evidence connecting the accused therewith will suffice, and it is not necessary to connect him directly with the actual crime. 15A C.J.S. Conspiracy, Section 93, pages 1152-1156.

It is respectfully submitted that the evidence is sufficient to sustain Nash's conviction of the crime charged.

Nash agreed to sell one thousand cases of scotch whiskey to the beverage agents. At that time Nash advised the agents that the whiskey was "hot". Nash visited the home of Shea at 10:30 on the night before the larceny. (R 516). Nash directed the beverage agents to the Anchorage Bar and also directed the exchange of money for the truckload of whiskey. Nash again advised the agents that "we better get our of here. That whiskey is pretty hot." Nash left the money inside the tavern. Bills which had been previously marked by the beverage agents were found in Nash's wallet at the time of his arrest. After the larceny, Nash, on two occasions, went to the Gray home in an effort to collect the money. Nash made phone calls to the same effect.

It is respectfully submitted that this evidence is sufficient, standing alone, to connect Petitioner Nash with conspiracy to commit grand larceny. Nash's characterization of the whiskey as "hot" indicates that Nash knew the whiskey had been stolen. The word "hot" is synonymous with "stolen" and is a thief's word for "stolen". *United States v. Nelson,* 185 F2d 758, 760; *United States v. Rappy,* 157 F2d 964, 966.

Nash's visit to the home of Jack Shea, the actual perpetrator of the grand larceny, on the evening before the crime, was also evidence on which the trier of fact could rely in tying Nash to the conspiracy. The fact that Nash was able to direct the beverage agents to the rendezvous point with the thieves at the Anchorage Bar

and that he was able to direct the exchange of money in a manner worthy of a spy thriller, discloses prior liaison and coordination with the thieves. The fact that money which was handed over to the theives at the rendezvous was later found in Nash's pocket shows a contact with the thieves and with the conspiracy. Nash's visit to the home of the beverage agent, Gray, is significant. Nash was upset because Gray had not given him the right amout of money. The Court will recall that this money was delivered to the thieves. This fact also shows that after the larceny, Nash had some contact with the thieves. As pointed out above once the conspiracy was shown to exist, slight evidence is all that is needed to connect Nash with the conspiracy. (15A C.J.S. Conspiracy, Section 93, pages 1152 through 1156.) It is, therefore submitted, that the above evidence, standing alone, is sufficient to connect Nash with the conspiracy to commit grand larceny.

The above evidence does not stand alone. The Court's attention is directed to State's Exhibits 8, 10 and 11, consisting of photographs of a truck with the name Moredock Leasing painted thereon. Moredock Leasing is a local truck rental agency. Nash contends that he did not know that the whiskey was stolen. Can this contention stand in the face of the fact that Nash did not merely sell the beverage agents one thousand cases of scotch whiskey, but also transferred to their possession, with no instruction as to the disposition to be made thereof, a truck which obviously had been rented from a truck rental agency. The agents were not told that they must unload the truck and return it to Nash

or to any other person. For all the record shows, the agents were free to dispose of the truck as they pleased.

It is respectfully submitted that this fact shows beyond any shadow of a doubt that Nash knew that the whiskey had been stolen. This fact, when taken in connection with the facts outlined above, is more than sufficient to to tie Nash to the conspiracy to commit grand larceny.

POINT IV

THE THIRD DISTRICT COURT OF APPEAL DID NOT DENY PETITIONER NASH DUE PROCESS UNDER THE LAW OF THE STATE OF FLORIDA RELATING TO THE CRIME OF CONSPIRACY WHEN IT HELD, IN AFFIRMING HIS CONVICTION OF CONSPIRACY TO COMMIT GRAND LARCENY, THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION AND AT THE SAME TIME REVERSED HIS CONVICTION OF GRAND LARCENY ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT?

Petitioner Nash very logically argues that because the Third District Court of Appeal held that the evidence was insufficient to support his conviction of grand larceny. the evidence must also be insufficient to support

petitioner's conviction of conspiracy to commit grand larceny. Respondent agrees that the opinion of the Third District Court of Appeal is illogical. But this is a sword that cuts two ways. Respondent has always contended, that if the evidences was sufficient to convict of conspiracy to commit grand larceny then the conviction of grand larceny should have been affirmed. (See respondents cross petition for writ of certiorari filed in the Florida Supreme Court.)

The law in Florida is well settled that when two or more people enter into a conspiracy to commit an unlawful act, each must take the risk of being bound by the action of the others taken or done in the futherance of the perpetration of that particular act, so long as the conspiracy lasts. *Strickland v. State* (Fla. 1936) 165 So. 289. *Tucker v. State* (Fla. 1930) 131 So. 327. Such an individual is a principal in the unlawful act even though he was not physically present during the perpetration of the act. Section 776.011 Florida Statutes *Prather v. State* (Fla. App. 1966) 182 So.2d 273.

It is respectfully submitted that if the evidence was sufficient to connect Nash with the conspiracy to commit grand larceny he must also, under the laws of Florida, be guilty of the crime of grand larceny. Therefore, while the Third District Court of Appeal may be faulted for it's knowledge with respect to the law of conspiracy, it certainly may not be accused of denying Nash due process of law. If anything, it gave Nash a "gift horse". Nash is now requesting this Court to look into the horse's mouth.

POINT V

PETITIONER ROBERT'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE.

The facts surrounding the statement, as reflected by the record before the Third District Court of Appeal, were as follows: Detective Kogan, Dade County Sheriff's Office advised Roberts that he did not have to tell anything and that anything he did tell would be used in court against him (R 566, 574). Detective Kogan advised Roberts that he had better secure a lawyer and bondsman (R575). Mr. Norman Haft, the attorney who represented Roberts at the trial, appeared (R 577). Mr Haft had a conversation with Roberts (R 593).

Roberts testified that Detective Rein threantened to "put him through the wall" (R 614). However, he stated that he did not answer any questions even though Rein allegedly threatened to "put him through the wall" (R 614). Gertrude Prau, the stenographic reporter for the Dade County Sheriff's Office, who took Roberts' statement, testified that at no time, in her presence, did Roberts complain that Detective Rein had brought him into a room and threatened to beat him up or push him through a wall (R 636).

At the end of the statement, which was given by Roberts, there appears the following:

" 'Question: Has this statement been made freely and voluntarily?

Answer: Yes

Question: Have you been made any promises?

Answer: No.

Question: Any threats made against you?

Answer: No.

MR. SANDSTROM: Thank you.' "

The day following the giving of the statement, Roberts talked to a Mr. Wolinsky, who was a friend of his. Mr. Wolinsky was the first man Roberts spoke to when he got out of jail. Roberts admitted that he did not mention the threats to Mr. Wolinsky (R 615). Based on these facts, the Third District Court of Appeal held as follows:

> The State does not contend that this testimony is directly refuted in the record. *However, it is urged that there was sufficient evidence before the court upon which it could have found that the confession was freely and voluntarily given.*
>
> We hold that *under the circumstances of this case* the testimony above quoted was not sufficient to require, as a matter of law, a finding by the trial judge that the subsequently given confession was involuntary." (Emphasis supplied) 188 So.2d 392 at 394.

CONCLUSION

Petitioner failed to raise a substantial Federal question in the Courts below. This Court is therefore without jurisdiction. The evidence was sufficient to support petitioner Nash's conviction for conspiracy to commit grand larceny and also for grand larceny itself. The deletion of all references to petitioner Nash in Rosen's confession and the absence of such reference in Robert's confession together with the Court's charge to the jury, preclude the possibility of any denial of due process by reason of the admission into evidence of the confessions of the co-conspirators.

There was no need to attempt to refute directly Robert's testimony as to the alleged threat by Officer Rein. The circumstances surrounding the confession were sufficient to discredit Robert's testimony in this regard.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
Tallahassee, Florida

JAMES T. CARLISLE
Assistant Attorney General
P. O. Box 640
Vero Beach, Florida 32960

Counsel for Respondent

SUPREME COURT, U. S.
SEP 25 1967
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 371

LOUIS NASH,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139

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ARGUMENT

In addition to the Federal question (R. 639, 641) presented at the trial showing the jurisdiction of this court, it is submitted that because of the peculiar circumstances of this case questions raised by the Petitioner for the first time should be available on appeal to this Court. Petitioner NASH was convicted at the trial of conspiracy to commit grand larceny and grand larceny. It was urged then, and at all times, that there was no evidence to support the conviction of either crime. On appeal, the Florida District Court of Appeal found that there was insuf-

ficient evidence to convict of the crime of grand larceny but there was evidence to convict of conspiracy to commit grand larceny. It is urged that these conclusions are so inconsistent that their affirmance by the State Supreme Court presents a Federal question to be decided by this Court. If the Defendant had actually conspired to steal the whiskey, then he would be guilty as a principal of the larceny itself. Florida Statute § 776.011. However, the District Court of Appeal found that there was no evidence of larceny; this was entirely consistent with the record. This finding, with its appellate support, so emphasized the fact that there was no evidence in the record to support the conviction of conspiracy that the **Thompson v. Louisville,** 362 U.S. 199, 4 L.Ed. 2d 654, 80 SC 624, 80 ALR 2d 1355, doctrine (which provides that a lack of due process results where there is no evidence offered of the crime) is applicable. It was impossible prior to that time to allege this Federal question since, as pointed out in **Thompson, supra,** this Court will not look at the quality of evidence nor will it weigh the quantity; it will only consider the absence of evidence. A Petitioner should not be denied his Constitutional rights merely because his attorney in the trial court did not foresee the fact that the Federal question would arise from the opinion of an appellate court. This Court has held that where the facts of the case make it impossible to raise the Federal question at an earlier date, it will accept the case if raised at the earliest possible time. **Great Northern Railway Company v. Sunburst Oil and Refrigeration Company,** 287 U.S. 358 (1932).

The next point presented to this Court is that because there is no evidence to support a conviction for conspiracy to commit grand larceny the conviction should be re-

versed. As previously pointed out, the record of this case is completely silent as to any inference of the Petitioner NASH'S participation in the specific conspiracy to steal whiskey. This Court stated in **Ingram v. U. S.**, 360 U.S. 672 (1959), that a conspiracy cannot be proved by building inference upon inference nor can it be used as a "dragnet to draw in all substantive crimes." Yet this is precisely what was done by the State.

The State contends that the use of the word "hot" by the Petitioner indicates that he knew that the whiskey was stolen. The record, however, clearly shows that at all times the Petitioner was referring to untaxed or "Island" whiskey (Tr. 17, 18, 30, 32, 53, 61, 63 and 77). There is no statement by NASH or conversation with NASH concerning stolen whiskey. Also, the State has attempted to draw a pattern from the facts which would show that NASH knew of the theft. The record, however, contains no evidence of any knowledge by NASH that the whiskey was stolen. All that the record shows is that NASH agreed to supply "Island" whiskey, that he made a deal to get a supply and that he received money for it. The record does not show that he ever was a party to the theft or knew of the theft either before or after it occurred. In fact, even the Florida District Court of Appeal on review of the facts and with the presumption of validity in favor of the trial court that the verdict was correct found no such evidence. The State also relies heavily on the fact that NASH failed to insure that the truck used for transporting the liquor would be returned to its rightful owner. It is submitted that Nash was not charged nor convicted for an illegal use of a truck but for conspiring to steal whiskey. The use of the truck cannot possibly show beyond a "shadow of a doubt" that NASH

knew the whiskey was stolen. Petitioner further contends that the law of Florida provides that where circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of innocence, and evidence which leaves one with nothing stronger than a suspicion that the defendant committed the crime is not sufficient to sustain a conviction. **Mayo v. State,** 71 So.2d 899 (1954). In this case the courts below relied completely on circumstantial evidence. It is reasonable to conclude from the record that the Petitioner thought the whiskey was "Island" whiskey, and never knew that it was stolen.

Petitioner contends that the confession admitted into evidence over his objection (Tr. 285, 287, 289 and 409) was a post-conspiratorial statement, that it was prejudicial to the Defendant NASH, and that it was not properly limited by the trial court so as to prevent any "spill-over" effect. As pointed out by this Court in **Delli Paoli v. U.S.,** 352 U.S. 232 (1957), where a post-conspiratorial confession is used at the trial, the trial judge must go to great lengths to caution the jury that it is evidentiary only as to the party making it. This instruction is to be made both at the time the evidence is admitted and in the charges to the jury. In this case, however, the trial judge cautioned the jury only during his charges and then not in the manner that has been prescribed by this Court.

It is conceded that the cases permit inconsistent verdicts. Petitioner respectfully urges, however, that in this case logic impels a limitation on that statement of law.

For example, one might be indicted for conspiracy to defraud a bank. The conspiracy would be Count I. Substantive counts might be added charging specific overt acts such as arranging a fraudulent loan with "A" as Count II, arranging a fraudulent loan with "B" as Count III, arranging a fraudulent loan with "C" as Count IV, etc. In that case, it is conceivable that the facts might show guilt of the conspiracy, although there were no facts sufficient to prove one or more substantive counts.

In this case, however, there is only one fact involved.

The sale of whiskey is not in issue. Everyone concedes that it was sold. The single factual question presented insofar as NASH alone is concerned is his involvement in the theft. That raises the only fact question of knowledge of the theft, for no one contends that he personally participated in the theft. The rejection of guilt by the District Court of Appeals in holding that no evidence existed to show involvement in the theft inescapably leads to the conclusion that there was no evidence to prove the only charging fact concerning Nash in any phase of the case. Where one fact alone is involved Petitioner respectfully submits that the absence of any evidence sufficient to prove that single fact on one count must lead to the conclusion that evidence is not present on the other count. In this case inconsistent verdicts are untenable.

CONCLUSION

This case represents an extension of the principle of inconsistent verdicts discussed by this honorable Court in **Dunn v. U. S.**, 284 U.S. 390 (1932). Petitioner urges granting of the Petition.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139